



## CHAPTER FIVE

### SPECIAL COURTROOM PROCEDURES

#### I. Use of Electronic Equipment.

##### A. Videotaped Testimony.

A videotaped deposition of a complaining witness may be taken in sexual assault cases provided the accused consents to the taking of any such deposition. Va. Code Ann. §18.2–67. The deposition is taken as if it were in open court, with the defendant maintaining a right to cross-examine the witness. The transcript may then be read to the jury in lieu of the witness’s testimony. Because the defendant must consent to this procedure, however, this provision is of limited use and is rarely used.

##### B. Closed Trial (BACIGAL at §16-2).

The trial court may “exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.” Va. Code Ann. §19.2-266. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Supreme Court found that the right of the public and press to attend criminal trials is guaranteed by the first and fourteenth amendments. The Court did not address the validity of Va. Code Ann. §19.2–266 because the issue had not been sufficiently addressed on appeal. *Id.* at 562–63 n.4. *See also Waller v. Georgia*, 467 U.S. 39 (1984) (“the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public”); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (court must articulate its findings for the record prior to closure).

##### C. Closed Circuit Television Testimony

Two-way closed-circuit television testimony may be used in prosecutions of criminal sexual assault, kidnapping, and other family offenses (Va. Code Ann. §18.2–362 *et seq.*) committed against children 14 years old or younger at the time of the offense and 16 or under at the time of trial. Va. Code Ann. §18.2–67.9 (applies also to witnesses 14 or younger at the time of trial). Either the Commonwealth’s Attorney or the defendant may apply for an order authorizing the closed-circuit television testimony but the application must be made at least seven days before the trial or the preliminary hearing. *See* Department of Criminal Justice Services, CHILD WITNESS TESTIMONY IN COURT: USING CLOSED-CIRCUIT EQUIPMENT (June, 2002).

In *Johnson v. Commonwealth*, 40 Va. App.605, 580 S.E.2d 486 (2003), the Court of Appeals upheld the constitutionality of §18.2–67.9, and also its use in the case where a foundation was laid by evidence that the then seven-year-old child victim of sexual abuse said “she would run out of court and run away” if put on the witness stand in open court. *Id.* at 611, 580 S.E.2d at 489. Likewise, in *Parrish v. Commonwealth*, 38 Va. App. 607, 567 S.E.2d 576 (2002), defendant was convicted of the sexual abuse of his six-year-old daughter, and he contested on appeal the ruling of the trial judge allowing the testimony of the girl by closed-circuit television. The court permitted

the use of closed-circuit television after a *voir dire* hearing was held satisfying the requirements of the statute permitting the use of such testimony, including expert testimony about the young girl's fear of court, her short attention span, and the likelihood of emotional trauma based on her experience while testifying in juvenile court. Also, in *Civitello v. Commonwealth*, No. 1963-01-2 (Va. Ct. App. Jan. 7, 2003) (unpublished), the defendant was convicted of twenty counts of taking indecent liberties with a child, seven counts of aggravated sexual battery, three counts of forcible sodomy, three counts of child pornography, one count of rape and one count of attempted sodomy. There were six complaining child witnesses and the court permitted two to testify by the use of closed circuit television, action the appellate court upheld because of sufficient findings by the trial court to warrant the use of that method of testimony.

As illustrated by *Johnson*, *Parrish*, and *Civitello*, in order for a court to order the use of closed-circuit television, it must find the child unavailable to testify in open court for at least one of the following reasons: i) the child persistently refuses to testify despite judicial requests to do so; ii) the child is substantially unable to communicate about the offense; or iii) there is substantial likelihood, based upon expert opinion testimony, that the child will suffer severe emotional trauma from testifying in open court. Va. Code Ann. §18.2-67.9. The court must include in the record or in written findings the reasons for finding unavailability.

## II. Other Special Procedures

The conduct of the trial of a criminal case rests within the sound discretion of the trial judge and will be reversed on appeal only if the judge abuses that discretion. *Justus v. Commonwealth*, 22 Va. 667, 676, 283 S.E.2d 905, 910 (1981), *cert. den.*, 455 U.S. 983 (1982). A well-educated and understanding trial judge can provide a great deal of protection to a child victim while at the same time preserving all of a defendant's constitutional rights. Among the possible protective actions are the following:

- The use of leading questions. (FRIEND at §3.5; BACIGAL, TATE & GUERNSEY at 181). *Flint v. Commonwealth*, 114 Va. 820, 76 S.E. 308 (1912) (holding that the trial court has much discretion to allow leading questions). The prosecutor ought to learn outside the presence of the jury how much latitude the court is willing to allow.
- The use of anatomically correct dolls. *Kehinde v. Commonwealth*, 1 Va. App. 342, 338 S.E.2d 356 (1986) (use of anatomical dolls as demonstrative evidence is within the discretion of the trial court and it is for the jury to determine as a factual matter the exact body part that the victim is identifying when using the doll). See Lori S. Holmes, "Using Anatomical Dolls in Child Sexual Abuse Forensic Interviews," 13 *Update*, No. 8 (2000).
- The presence of a guardian ad litem or other support person. If a preliminary hearing has been closed under the provisions of Va. Code Ann. §18.2-67.8, a request that a support person be allowed nonetheless may be honored by the judge. Similarly, the court may allow an adult support person chosen by the child to remain in the courtroom during the child's testimony and may allow the person to sit with the child as long as the person does not speak to or signal to the child.

Va. Code Ann. §§16.1–302.1, 19.2–265.01. In addition, §19.2–11.1 of the Code provides for victim-witness assistance programs. *See* Susanne Walters, “Effective Strategies for Victim Advocates in Child Abuse Cases,” 13 *Update*, No. 12 (2000).

- The court may require that defense counsel not ask compound, leading questions, or use language that the child cannot understand. In *Crump v. Commonwealth*, 20 Va. App. 609, 460 S.E.2d 238 (1995), the Court of Appeals ruled that the defendant was not denied his right to confrontation when the eight-year-old victim refused to answer questions on cross-examination that were repetitive of her testimony on direct examination. The court also found that the defendant was given “a full opportunity to conduct an effective cross-examination” and “[w]hen the child failed to respond, she had been extensively and repetitively questioned by two lawyers and the judge.” *Id.* at 616–617, 460 S.E.2d at 241. The court also observed that “the transcript does suggest that the child was being questioned in a manner that did not reflect a sensitivity for her age.” *Id.*
- The prosecutor must object to improper questions that confuse or badger the child.
- In *Parrish v. Commonwealth*, 38 Va. App. 607, 567 S.E.2d 576 (2002), the court did not rule of the propriety of the child victim coloring in a coloring book during cross-examination since defendant did not object at trial and there was no showing that a failure to address the issue would constitute a “miscarriage of justice.”
- The prosecutor may schedule a child’s testimony in a way that gives the child frequent opportunities to break for a few minutes without inconveniencing the court and also takes in to account the time of day that is best for the child.

*See also* MANUAL, Chapter Six, part V, for more ideas.

